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No. 85-178

In the Supreme Court of the United States

OCTOBER TERM, 1985

OSCAR DE LE PUENTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether it was reversible error for the district court to fail to inform petitioner explicitly that he could not withdraw his guilty plea if the government's recommendation to the court regarding sentencing was not followed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B6) is reported at 755 F.2d 313.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1985, and a petition for rehearing was denied on March 18, 1985. On May 20, 1985, Justice Brennan extended the time for filing a petition for writ of certiorari to and including June 16, 1985 (Pet. App. A1). The petition was filed on Monday, June 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 15, 1984, an indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioner with distribution of

cocaine and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to commit these offenses, in violation of 21 U.S.C. 846 (Pet. App. B2; C.A. App. 18-22). Petitioner subsequently agreed to plead guilty to the two substantive counts in exchange for the government's promise to dismiss the conspiracy count and to recommend a sentence of no more than five years' imprisonment.

At the outset of the plea hearing, the prosecutor outlined the nature of the charges against petitioner and informed the court of the contents of the plea agreement (C.A. App. 31-35, 40-42). Addressing petitioner personally, the district judge advised him of the minimum and maximum penalties available under the statute (*id.* at 42-43, 51-53). The court also informed petitioner that it was not obligated to follow the government's sentencing recommendation (*id.* at 43-44) and that petitioner would waive various procedural rights by pleading guilty (*id.* at 44-46). Finally, the court assured itself that petitioner's decision to plead guilty was voluntary and uninfluenced by any promises other than the plea bargain (*id.* at 46-50). In short, the court painstakingly complied with the procedural requirements of Fed. R. Crim. P. 11 in all conceivable respects but one: it neglected to inform petitioner explicitly (see Rule 11(e)(2)) that he could not withdraw his plea in the event that the court declined to follow the sentencing recommendation.[1] At the conclusion of the colloquy, the court accepted the plea as knowingly and voluntarily made (C.A. App. 53).

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[1]Rule 11(e)(2) provides in relevant part:

> If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

On June 20, 1984, petitioner appeared for sentencing. Rejecting the government's recommendation, the court sentenced petitioner to consecutive 10-year terms of imprisonment, to be followed by a special parole term of 10 years (Pet. App. B4; C.A. App. 25, 67-68).

2. On direct appeal, petitioner claimed that he was entitled to automatic reversal of his conviction because of the district court's failure to advise him explicitly that, once his plea was entered, he could not withdraw it if the court declined to follow the government's sentencing recommendation. Although holding that the district court had technically violated the requirements of Rule 11(e)(2), the court of appeals found that "[t]he Rule 11 colloquy was adequate in all other respects" and that there was no "realistic likelihood that [petitioner] labored under the misapprehension that his plea could be withdrawn" "in view of the extensive advice which he was given pursuant to Rule 11(c)" (Pet. App. B5). Concluding that the error was harmless under Rule 11(h), the court of appeals affirmed petitioner's conviction (Pet. App. B5-B6).

ARGUMENT

Petitioner contends (Pet. 8-12) that, notwithstanding the harmless error directive of Rule 11(h), the failure to comply with Rule 11(e)(2) in a guilty plea colloquy automatically requires the grant of an opportunity to plea anew. This contention, which would leave little if anything of Rule 11(h) in the Rule 11(e)(2) context, was properly rejected by the court of appeals' fact-bound decision, which does not conflict with the rulings of this Court or any other court of appeals.

1. Rule 11(h) requires that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." In providing that the harmless error rule applies to procedural defects occurring

during plea hearings, the drafters of Rule 11(h) intended to undo the automatic reversal standard that had sometimes been applied in the aftermath of this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), with respect to Rule 11 procedural defects raised on direct appeal. As the Fed. R. Crim. P. 11 advisory committee note (1983 amendment) (citation omitted; emphasis in original) states:

> Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that *McCarthy* dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a *truly* harmless error * * * are much greater under present Rule 11 than under the version before the Court in *McCarthy*. It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in *McCarthy*, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather " 'a grave and solemn act,' which is 'accepted only with care and discernment.' " A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Thus, the Committee had stated earlier, "Rule 11 should not be given such a crabbed interpretation that ceremony [is] exalted over substance."

There was here a failure to comply with Rule 11(e)(2) only in the most technical sense. The district court carefully informed petitioner of the full range of penalties available upon conviction, twice warned him that it was free to impose a sentence higher than that recommended under the terms of the plea agreement,[2] and told him three times that, if he pled guilty, there would be no trial.[3] These points would hardly have been worth stressing were it not the clear implication that, if the recommendation were rejected, defendant would still be bound to his guilty plea. Petitioner does not assert that he would not have pled guilty had the district court told him more explicitly that he could not

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[2]See C.A. App. 43-44:

> THE COURT: Now, the United States Attorney has agreed to recommend to the Court that the sentence that should be imposed within this range, if it's a jail term, it should not exceed a total of five years.
>
> What you have to understand now is that the Court, while it will listen to that recommendation and consider the Government's recommendation very important, the Court is not bound by that recommendation. That is, the Court could impose a sentence that would be less than that or more than that, within the range that I have outlined [earlier, at page 42].
>
> Do you understand that?
>
> [PETITIONER]: Yes.
>
> THE COURT: So if you plead guilty, it will be on the basis that the Court will receive the recommendation of the Government and will hear from your attorney and will hear from you, and the Court will then impose a sentence in the range between probation and up to a maximum of 30 years in prison together with a fine of up to $50,000 or both.
>
> Is there any question about that?
>
> Do you have any questions, Mr. de l[e] Puente about that?
>
> [PETITIONER]: No.

See also C.A. App. 51-53.

[3]C.A. App. 44, 45, 46.

withdraw his plea; he does not assert that he was unaware that he would be unable to do so. See *United States* v. *Kearney,* 750 F.2d 787, 791 (9th Cir. 1984). He did not object to the procedures or request that the guilty plea be withdrawn at the time of sentencing. Nor is there any indication here of a motive for petitioner to plead guilty to a crime he did not commit (compare *North Carolina* v. *Alford,* 400 U.S. 25 (1970)); as the Advisory Committee note stated (see page 4, *supra*), guilty pleas are to be made solemnly and should not be reversible at the defendant's whim.[4]

2. Nor do the cases relied upon by petitioner conflict with the Third Circuit's ruling here. Two of those cases—*United States* v. *Burruezo,* 704 F.2d 33 (2d Cir. 1983), and *United States* v. *Stanton,* 703 F.2d 974 (6th Cir. 1983)—were decided prior to August 1, 1983, the effective date of Rule 11(h). It is therefore hardly surprising that those courts did not consider Rule 11(h), but instead applied a more or less automatic reversal rule of the sort that had prompted Rule 11(h). Indeed, the Sixth Circuit has expressly held that its decision in *Stanton* is no longer viable in light of Rule 11(h). See *United States* v. *Stead,* 746 F.2d 355, 357 (1984), cert. denied, No. 84-6137 (Mar. 4, 1985). A third case relied on by petitioner, *United States* v. *Blackner,* 721 F.2d 703 (10th Cir. 1983), also involved a guilty plea entered before Rule 11(h)'s effective date of August 1, 1983. While

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[4]While the facts of this case make it clear that there is at most only harmless error, and made it unnecessary for the court of appeals to delineate a general theory about the application of Rule 11(h) to the Rule 11(e)(2) context, the logical approach would require the defendant, on this matter relating to his own state of mind, at least to come forward with evidence indicating that the omission of the explanation required by Rule 11(e)(2) influenced his decision to plead guilty.

the court of appeals' decision was handed down afterwards,[5] the court there did not discuss Rule 11(h) and may not even have been aware of it.[6]

Equally unavailing is petitioner's reliance on *United States* v. *Corbett,* 742 F.2d 173 (5th Cir. 1984). There the court expressly recognized that, since adoption of Rule 11(h), "non-compliance with the post-*McCarthy* requirements of Rule 11 and 'inadequate addresses' of the core concerns that do not rise to the level of 'entire failures' do not require automatic reversal" (742 F.2d at 178 n.14). Under the particular circumstances of *Corbett,* the total failure of the district court to address a core concern of Rule 11—*i.e.,* to apprise the accused of the essential elements of the offense—was found to merit reversal. The instant case, of course, does not involve a failure to explain the elements of the offense; nor does it involve an "entire failure" to address a core concern of Rule 11. The district court here substantially apprised petitioner of the direct consequences of his plea, failing only to mention explicitly petitioner's inability to withdraw the plea once it was entered. Thus, in the terms of *Corbett,* this case involves, at most, merely "inadequate[ly] address[ing]" a core concern, rather than an "entire failure[]" to do so; accordingly, the harmless

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[5]This was also the situation in *United States* v. *Iaquinta,* 719 F.2d 83 (4th Cir. 1983), which petitioner does not cite; there, too, the court did not discuss Rule 11(h) and was probably unaware that it had become effective two months earlier.

[6]*Blackner* and *Burruezo* are otherwise distinguishable as well. In *Blackner,* the district court had not been told of the plea bargain agreement, so Rule 11(e)(5) had been violated, too. In addition, the defendant there alleged that he misunderstood or was misled about the plea bargain, which is not the case here. In *Burruezo,* the government did not contest the vacatur since, inter alia, it apparently believed that the defendant's understanding of the consequences of the bargain and of the plea was unclear (704 F.2d at 33, 39 n.4), which we do not concede here.

error rule would be fully applicable. As *Corbett* said, "[W]e do not demand 'letter-perfect compliance' with each of the rule's many requirements." 742 F.2d at 178, quoting *United States* v. *Dayton*, 604 F.2d 931, 939 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980).[7] If the defect in the instant case be "entire failure," then so is almost any technical violation of Rule 11, and *Corbett* would effectively negate Rule 11(h).[8]

Thus, the court of appeals' decision was correct, and is not in conflict with the decision of this Court or any other court of appeals. It is, in any event, a fact-bound determination by that court that in the context of the overall colloquy the district court's deviation in one respect from Rule 11's prescriptions was harmless.

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[7]The Fifth Circuit's en banc decision in *Dayton* set out the principle followed in *Corbett* that only "entire failures" to address "core concerns" merited automatic reversal. Technical violations like the case here did not: "One who has pled guilty and done so voluntarily, understandingly, and with knowledge of the consequences of his plea—as the strict compliance with *McCarthy* that we today require ensures—has evinced a desire to waive technicalities, to come to terms with the legal system, and to admit his fault." 604 F.2d at 939-940. And: "Where each of Rule 11's core inquiries [lack of coercion, comprehension of the charge, and knowledge of the plea's direct consequences] has been *reasonably implicated* in the rule's required colloquy, we will examine its treatment to determine whether it has been sufficiently exposed to inquiry and determination. If so, we will not disturb the result." *Id.* at 940 (emphasis added).

[8]A typographical error at Pet. 11 (the open quotation mark before "An" on line 7) may lead the Court to think that the advisory committee note to Rule 11(h) cites *Corbett*; it does not. The petition is apparently referring there to *Corbett*'s citation to *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977), which the note did cite. 742 F.2d at 179 n.14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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